

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMPANY PETITION NO.299 OF 1994

M/s.Varkey Overseas Trading
Co.Pvt.Ltd. ...Petitioners

Versus

Sumeet Machines Ltd. ...Respondents

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Mr.Ravi Kadam, Advocate General with Mr.Indranil
Deshmukh i/b Amarchand & Mangaldas & Suresh
A.Shroff & Co. for Petitioners.

Mr.D.D.Madan with Mr.A.C.Mahimkar for Respondents.

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CORAM: A.M.KHANWILKAR, J.

JUNE 17, 2005.

P.C.

1. Heard Counsel for the parties. This
Petition is filed under Sections 433 and 434 of the
Companies Act for winding up of Company Sumeet
Machines Ltd., the Company incorporated under the
provisions of Companies Act, having its registered
office at 601-C, Poonam Chambers, Worli, Bombay -
400 018.

2. The case of the Petitioners is that the Respondent Company was engaged in the manufacture of electrical appliances like domestic mixing machines, kitchen machines, washing machines, etc. After negotiations, an Agreement was arrived at between the Petitioners and the Respondent Company for clearing and forwarding of the goods of the Respondent Company. Clause (1) of the agreement provides that the Respondent Company appoints the Petitioners as its clearing and forwarding agent to handle, store and distribute the goods for the whole of the Southern India, consisting of the four States and Union Territories of Pondicherry and Mahe with effect from the date of signing of the agreement and the agreement was to come into effect on deposit of Rs.50,00,000/- (Rupees Fifty Lakhs) by the Petitioners with the manufacturer company, unsecured interest free deposit. It is not necessary to burden ourselves with all the clauses of the agreement, except to point out that in clause 15, it is clearly provided that the property/title in the products in the possession or under the control of the agent (Petitioners) by virtue of the agreement

shall always be deemed to be vested in the Respondent Company alone and the Petitioners shall have no lien on the products and shall not hypothecate, pledge or otherwise dispose of the products otherwise than in accordance with the instructions of the manufacturer. The agreement was to operate for a period of five years in the first instance, thereafter to be automatically extended by mutual consent for further periods. Clause 17 of the agreement further provides that it is always open to terminate the agreement by the Petitioner at any time without assigning any reasons therefor. The Petitioner's case is that the Respondent Company faced certain problems on account of which the work between the parties became difficult. As a result, the Petitioners had various meetings with the representative of the Respondent Company for mutually resolving the problems faced interse. It is the case of the Petitioners that on 4th January 1992, a meeting was held at Bangalore and discussions held thereat were minuted and signed by the concerned parties. The summary of the decisions taken and agreed to during the said meeting are mentioned in the minutes of the meeting produced at

Exhibit 'E', which reads thus :

"1. Mr.Ajay Mathur agreed to pay interest on the deposit of Rs.50.00 lakhs with effect from 01.01.92 at 24% p.a. He was also agreeable as a matter of principle to return the deposit of Rs.50.00 lakhs in equal monthly instalments of Rs.10.00 lakhs starting from 1st January 1992. The last instalment would be repaid by 31st May 1992. Until such time the interest as aforesaid would be paid on the balances.

. Mr.Ajay Mathur was agreeable to adjust the monthly instalments of Rs.10.00 lakhs against the monthly supplies to ease his company's financial burden on this account.

2) S Koder would try to increase the selling price of Sumeet products and to get better prices. If this would not be possible then both the Companies would review the situation by 31.3.92.

3. The overriding commission of 1.5% would not become payable from 01.01.92 onwards.

4. SMPL would try to obtain bill/LC discounting limits with its bankers and Mr K Sukumar agreed to assist them to obtain this facility from the Federal Bank and other Bankers. In addition S Koder would try to obtain additional bill discounting limits for itself.

5. S Koder would not consider the proposal of distributing any of Maharaja products.

6. S Koder would take up distribution of other products only after discussions with SMPL.

7. With regard to vacuum cleaners which were returned by S Koder to SMPL, S Koder would inform SMPL it's decision on the following matters latest by 31.01.92 i.e.

a) Whether S Koder would continue to distribute vacuum cleaners in South India or

b) S Koder would permit SMPL to appoint other distributors in South India for Vacuum Cleaners.

The value of the vacuum cleaners already returned by S Koder would be adjusted immediately against future supplies.

8. With regard to the claim for overriding commission for the entire period up to 31.12.91 it was agreed that S Koder would waive 50% of its claim for this commission. The exact claim was to be verified by Mr Vasudev based on the statement prepared by Mr G Srinivas. it was agreed that SMPL would give credit notes for the 50% amount and to supply goods equivalent to this value immediately.

9. Other small dues such as insurance claim, free supplies made under instructions from Mr Ajay Mathur were also to be acknowledged by issue of credit notes to S Koder and adjusted against the supplies.

10. The washing machine subsidy of Rs.1.14 lakhs approximately was acknowledged by SMPL and credit notes were to be issued to S Koder and adjusted against supplies.

. Mr Ajay Mathur also stated that wherever he had verbally agreed and granted concession he would accept all this claims at face value."

3. It is the case of the Petitioners that even after acknowledging the liability, the Respondent Company did not fulfil its commitments under the agreement arrived at between the parties as recorded immediately in the form of minutes on 4th January 1992 referred to above. It is stated that eventually on 3rd May 1992 parties once again met and discussed the modalities of arriving at workable arrangement which has been recorded in the form of minutes duly signed by the parties, which reads thus:

"1. Sumeet Machines Pvt.Ltd. will take over all the showrooms and service centres of Sumeet, presently being run by S.Koder Ltd.

2. The accounts between Sumeet Machines Pvt.Ltd. and S.Koder Ltd. will be settled as under :

The deposit of Rs.50.00 lakhs and the estimated investment cost on the showrooms/service centres of Rs.30.00 lakhs, totalling to Rs.80.00 lakhs will be paid to S.Koder Ltd. on the following basis:

a) By way of supply of goods without payment.
During May 92 - equal to Rs.40.00 lakhs.
During June 92 - equal to Rs.30.00 lakhs.

b) The other accounts between Sumeet Machines Pvt.ltd., and S.Koder Ltd., will be scrutinised and finalised between Sumeet Machines Pvt.Ltd.' auditors - Price Water House, and S.Koder Ltd., representatives - Ford Rhodes & Parks, by May 31st, 1992, and the net amount due to S.Koder Ltd., if any, will be settled by way of stocks/cheque by June, 30th July, 1992.

3. The transactions between Sumeet Machines Pvt.Ltd., and S.Koder Ltd., during the may, June & July 92 will be as under :

a. In the month of May '92 Sumeet Machines Pvt.Ltd., will supply goods worth Rs.1.50 Crores as per the orders placed by S.Koder Ltd. However, S.Koder Ltd., will pay only Rs.1.10 Crores for the supply of goods to the value of Rs.1.50 crores.

The above will be done on a weekly basis as under :

Sumeet Machines Pvt.Ltd., will send goods for twice the value of the money sent by S.Koder Ltd., i.e. if S.Koder Ltd., sends Rs.25.00 lakhs to Sumeet Machines Pvt.Ltd., Sumeet Machines Pvt.Ltd., will send goods worth Rs.50.00 lakhs.

b. In the month of June 92, the same basis will continue until Rs.30.00 lakhs worth of goods is sent to S.Koder Ltd., without payment. However, if there is any financial difficulty being faced by S.Koder Ltd., Sumeet Machines Pvt.Ltd. will make

sure S.Koder Ltd., is extended necessary assistance.

c. S.Koder Limited shall not pay any money for the despatches made from the 1st of July 92 and therefore, theoretically whatever goods are lying with Varkey Overseas Trading Co.Pvt.Ltd., at the end of July 92 will belong to Sumeet Machines Pvt.Ltd. For the purpose of this exercise, the principle of first in, first out, will be followed, i.e., whatever is lying in stock will be assumed as coming from the last despatches.

Whatever stocks are held by Varkey Overseas Trading Co., Pvt. Ltd., as on 31st July 92, which have been paid for by Varkey Overseas Trading Co., Ltd., will be taken over by Sumeet Machines Pvt.Ltd., and paid for before 31st July, 1992.

4. All the expenses of running the showrooms/service centres including personnel costs and others, until July 92, will be borne by Varkey Overseas Trading Co., Pvt.Ltd., and thereafter from 1st August 92 by Sumeet Machines Pvt.Ltd.

The above points were discussed during the meeting held on 3rd May 1992 and are subject to confirmation with another subsequent meeting to be held before 8th May, 1992."

4. It is the case of the Petitioners that even the understanding reached, as articulated in the minutes of the meeting dated 3rd May 1992 referred to above, were not fulfilled by the Respondent Company. As a result, the Petitioners eventually

gave statutory notice to the Respondent Company on 31st March 1994. The said notice was duly served upon the Respondent Company, as can be seen from the acknowledgement sent on May 2, 1994. It is relevant to point out that the statutory notice has been sent through Advocate for and on behalf of the Petitioner Company as well as sister Company of the Petitioners M/s.S.Koder Ltd. The claim of the respective company is mentioned in the said statutory notice. Insofar as Petitioner Company is concerned, it is mentioned in the said notice that sum of Rs.73,00,000/- (Rupees Seventy-three Lakhs) was due to the Petitioners comprising of Rs.50,00,000/- (Rupees Fifty Lakhs) towards principal and sum of Rs.23,00,000/- (Rupees Twenty-three Lakhs) towards interest from 3rd May 1992 at the rate of 24% per annum till the date of the notice. Even the claim of the sister company of the Petitioner Company M/s.S.Koder Ltd. has been specified in the said statutory notice which is around Rs.47.70 lakhs. However, in the reply sent by the Respondent Company, without giving the break up as to from which of the clients of the Advocate Mr.Sriram Panchu, the Respondent Company claims to recover

Rs.12,56,861.57/- (Rupees Twelve Lakhs Fifty-six Thousand Eight Hundred Sixty-one & Paise Fifty-seven). It is asserted that amount was due to the Respondent Company. As no payment was received by the Petitioners and no further reply was also received, eventually Petitioners have filed the present Petition on 27th June 1994.

5. This Petition is resisted by the Respondent Company by filing affidavit of Mr.Ajay Mathur, Chairman and Managing Director of the Respondent Company. The substance of the stand taken in the reply affidavit is that the Agreement dated 22nd September 1990 which was executed between the parties was subsisting at the relevant time. It is the case of the Respondent that the Minutes recorded on 4th January 1992 in the meeting held between the representative of the two companies was only with a view to find out solution to the problem with an understanding that matter will be reviewed after some time. It is stated that subsequently meeting was held on 3rd May 1992 in which further agreement was reached between the parties so as to undo the

agreement recorded in minutes of 4th January 1992. According to the Respondent Company, the original Agreement dated 22nd September 1990 was still subsisting and was binding on both the sides. In the reply affidavit, it is further stated that the Respondent Company has, in terms of the understanding arrived at in meeting on 4th January 1992, on 3rd May 1992 offered to supply goods to the Petitioner Company, but the Petitioner Company failed to discharge its obligation. The affidavit then refers to the meeting held on 16th and 17th July 1992, in which certain agreement was reached, in terms whereof, the Respondent was entitled to adjust the outstanding dues of the Petitioners. However, the Petitioners, by filing rejoinder affidavit, have disputed the contents of the minutes produced by the Petitioners at Exhibit 2 to the reply affidavit. It is stated on behalf of the Petitioners that as the minutes which were prepared were not in conformity with the deliberations which had taken place at the meeting, the representative of the Petitioners refused to sign the minutes. Whereas, the minutes which are annexed to the reply affidavit filed by the Respondent at Exhibit 2 would

indicate that minutes were duly signed by the representative of the Petitioners. This position is, however, disputed by the Petitioners in the rejoinder affidavit. In the rejoinder affidavit, the Petitioners have also disputed the claim of the Respondents that the Respondents had, at any point of time, offered to supply the goods in terms of the understanding reached in the meetings held on 4th January 1992 or 3rd May 1992. On the above basis, the Petitioners pray that order in terms of prayer clause (a) ought to be granted insofar as the Respondent Company is concerned.

6. Having considered the rival submissions and going through the pleadings on record, I have no hesitation in allowing the Petition in terms of prayer clause (a). This is so because from the minutes recorded on 4th January 1992, it is seen that the Respondent Company acknowledged its liability to the extent of Rs.50,00,000/- (Rupees Fifty Lakhs) under the agreement dated 22nd September 1990 between the parties. Clause (1) of the Minutes clearly provides that the Respondent Company was to pay interest on the deposit of

Rs.50,00,000/- (Rupees Fifty Lakhs) with effect from 1st January 1992 at the rate of 24% per annum. It is then mentioned that the Respondent Company was also agreeable, as the matter of principle, to return the deposit of Rs.50,00,000/- (Rupees Fifty Lakhs) in equal monthly instalments of Rs.10,00,000/- (Rupees Ten Lakhs) starting from 1st January 1992. The last instalment was to be paid on 31st May 1992. It is also provided in paragraph (1) of the Minutes that the Respondent was agreeable to adjust the monthly instalments of Rs.10,00,000/- (Rupees Ten Lakhs) against the monthly supplies to ease Respondent's financial burden on this account. However, as stated in the Petition as well as rejoinder affidavit filed by the Petitioners, no supply is made in furtherance of this agreement to the Petitioners. In other words, the question of providing for any adjustment in respect of instalment amount does not arise.

7. To get over this position, it was contended on behalf of the Respondent that the Agreement reached in terms of clause (1) of the Minutes was only by way of good gesture shown by the Respondent

Company. In fact, under the agreement of 22nd September 1990, which was to enure up to five years i.e. up to 22nd September 1995, the Respondent Company was not liable to pay any interest on the deposit of Rs.50,00,000/- (Rupees Fifty Lakhs) to be made by the Petitioner. It is argued that the said agreement has not been terminated, for which reason, the Petition is premature. This argument clearly overlooks the assertion made in the Petition that the agreement of 22nd September 1990 was terminated. Besides, on fair reading of the Minutes of the meeting dated 4th January 1992, to my mind, it is more than clear that the parties discussed the entire problem and eventually arrived at an agreement which is reflected in the form of minutes of 4th January 1992. The parties are bound by the commitment made in the said minutes. In spite of the said commitment, the Respondent failed to pay any amount, much less, monthly instalments of Rs.10,00,000/- (Rupees Ten Lakhs) starting from 1st January 1992 nor any evidence is brought on record to support the stand of the Respondent that the Respondent offered to supply goods to the Petitioners. However, it is only bare words in the

reply affidavit filed by the Respondent that attempt was made to supply goods to the Petitioners, which was not accepted and the Petitioners failed to discharge its obligation under the arrangement agreed upon between the parties.

8. On the other hand, in the rejoinder affidavit, the Petitioners have clearly asserted that at no point of time, the Respondent Company offered to supply any goods, so as to adjust the amount towards instalments, as is contended. Further, it is stated in the rejoinder affidavit that the Petitioners called upon the Respondent Company to give inspection of the relevant records, however, inspection of the documents on the basis of which, the Respondent claims that they offered to supply and deliver goods to the Petitioners was never given to the Petitioners. No communication or confirmation of the order of the Petitioner Company has been placed on record. In that sense, the argument of the Respondent that they discharged their obligation under the Agreement is unsubstantiated. Accordingly, the stand taken on behalf of the Respondent is not bonafide. To my

mind, the Respondent Company has failed to discharge its obligation under the Agreement reached on 4th January 1992. It was contended on behalf of the Respondent that the agreement reached on 4th January 1992 was undone by the agreement reached in the meeting held on 3rd May 1992. At the same time, the Respondent contends that whatever agreement was reached in the meeting held on 3rd May 1992, the same was subject to confirmation which was never given. This stand is taken only to justify the argument that the agreement of 22nd September 1990 was operating and was subsisting and binding between the parties at the relevant time. On fair reading of the minutes of the meeting of 3rd May 1992, which are reproduced above, there is nothing to suggest that the agreement reached as reproduced in the minutes of 4th January 1992 was undone or superseded. On the other hand, the decision reached in the meeting of 3rd May 1992 was in continuation to the agreement already reached on 4th January 1992 between the parties. So understood, I see no reason to accept the argument canvassed on behalf of the Respondent that on account of the decision arrived at between the parties in the meeting held on 3rd

May 1992, the earlier agreement reached between the parties on 4th January 1992 cannot be given effect to. I am also not impressed by the argument that the agreement dated 22nd September 1990 subsisted or, for that matter, would preclude the Petitioners to claim the amount as agreed between the parties by virtue of minutes of the meeting recorded on 4th January 1992. In other words, the argument of the Respondent that the obligation to repay the amount of Rs.50,00,000/- (Rupees Fifty Lakhs) and interest accrued thereon, does not arise, is only to be stated to be rejected.

9. Besides, it is seen that the Respondent has placed on record minutes purportedly signed by the representative of the Petitioners in the meetings held on July 16th and 17th 1992. However, the Petitioners have expressly denied the fact that such minutes have been signed by the representative of the Petitioners. In response, the Respondent has neither produced the original copy of the minutes duly signed by the representative of the Petitioners, nor has filed further affidavit controverting this position. In other words, the

Respondent has taken a false plea before this Court and produced the document which is fabricated one. Similarly, the Respondent Company has failed to produce any record to establish the fact that pursuant to agreement reached between the parties on 4th January 1992, it offered to supply any goods to the Petitioner Company or in turn, Petitioner Company refused to discharge its obligation to receive such goods. I have, therefore, no hesitation in taking the view that the stand taken on behalf of the Respondent Company is not bonafide. The amount claimed by the Petitioners in this Petition is in the sum of Rs.77,00,000/- (Rupees Seventy-seven Lakhs). In the companion Petition, the claim is to the extent of Rs.47.40 lakhs. Moreover, it appears that proceedings for recovery of amount has been filed by the financial institutions against the Respondent Company, in which, claim for recovery is to the extent of over Rs.15 crores. Further, it is not in dispute that Receiver has been appointed in respect of the Respondent Company and no activities of production are carried out in the Respondent Company for over last five years. Besides, it is relevant to note

that although the Company has been offering to repay the dues during the pendency of this proceedings, however, no attempt has been made to pay even portion of the claim in this Petition or even the companion Petition.

10. Taking overall view of the matter, I have no hesitation in concluding that the Respondent Company is unable to pay its debts. Accordingly, this Petition succeeds. Petition is made absolute in terms of prayer clause (a).

11. Official Liquidator is directed to take possession of the assets of the Respondent Company and proceed in accordance law.

12. At this stage, Counsel for the Respondent Company prays for stay of operation of this order to enable the Respondent Company to take up the matter in appeal, if so advised.

13. As Court Receiver is appointed, who is stated to be in possession of the assets and properties of the Respondent Company, this order may

not be given effect to, for a period of four weeks from today.

A.M.KHANWILKAR, J.